GULA PADANG TERAP BERHAD & ANOR.

v.

WAH TAT BANK BERHAD

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[CIVIL APPEAL NO. R2-12-124-89]
6 MAY 1994

PRACTICE & PROCEDURE: Appeal - Dismissal of plaintiff's application under O. 26A SCR 1980 - Plaintiffs drawing cheque from bank - Cheque stolen - Cheque presented to defendants for collection - Defendants collecting proceeds of cheque and paying out to presenter of cheque - Whether defendants negligent - Burden of proving triable defence on defendants - Statement of defence to condescend to particulars - Consideration of O. 14 RHC 1980 - Principles applicable.

TORT: Negligence - Defendant bank paying out proceeds of cheque without verifying identity of presenter of cheque - Whether defendant protected by s. 85(1) of the Bills of Exchange Act 1949.

This was an appeal against the decision of the learned Sessions Court Judge dismissing the appellant's/plaintiff's application for summary judgment under O. 26A of the Subordinate Court Rules 1980 (SCR).

The plaintiffs were the drawer and payee respectively of a cheque for the sum of RM34,200 which was crossed and marked "Not Negotiable, Account Payee Only". Sometime between 2 January 1986 and 20 January 1986, the cheque was stolen by persons unknown. An account was apparently opened in the name of the 2nd plaintiff when the cheque was presented to the respondents/defendants for collection on 20 January 1986 and the defendants duly made payment to the person unknown. On 16 April 1986, the solicitors for the 2nd plaintiff wrote to the defendants requesting information in respect of the opening of the said account from the defendants which the defendants failed to provide. The learned Sessions Court Judge held there was a triable issue on whether the defendants had been negligent.

Held:

[1] In an application under O. 14 of the Rules of the High Court (RHC) (or O. 26A of the SCR) the issue is whether there is a triable defence. This means that it is for the defendant to show on merits that he has a good defence to the claim or that a difficult point of law is invoked or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable grounds of a *bona fide* defence.

[2] Section 85(1) of the Bills of Exchange Act 1949 (the Act) is for the protection of bankers but in order to have that protection they must prove that they had acted in good faith and that there was no negligence on their part. It was for the defendants to prove that they had not been negligent which they did not even try to do. They did not file any affidavit in opposition to the application nor did they contradict the material allegations in the affidavits filed in support of the application and are therefore deemed to have admitted them. The plaintiffs had clearly established a *prima facie* case against the defendants but it did not follow that in all cases when s. 85(1) of the Act is raised there ought to be a full trial. In a proper case the plaintiff may obtain judgment under O. 14 of the RHC or O. 26A of the SCR.

[3] The defendants had filed a statement of defence stating that they had at all times exercised the highest degree of prudence, skill and care in the business of bankers in the transaction. In the Court's opinion this was not sufficient to to raise a *bona fide* triable defence. It was only a bare denial. They had to condescend to particulars by way of an affidavit. They did not even disclose how they handled the application for the opening of the account in the 2nd plaintiff's name with the bank.

[Appeal allowed with costs. Judgment entered for the plaintiffs as prayed with costs].

Cases referred to:

National Company For Foreign Trade v. Kayu Raya Sdn. Bhd. [1984] 2 MLJ 300 ***(foll)***

Associated Tractors Sdn. Bhd. v. PMB (Kulim) Sdn. Bhd. & Ors. [1989] 1 MLJ 245 ***(foll)***

Perbadanan Pembangunan Ekonomi Sarawak v. Sarawak Motor Industries Bhd. [1989] 3 MLJ 246 ***(foll)***

Overseas Investment Private Limited v. Anthony William O'Brien & Anor. [1988] 2 CLJ 238 ***(cit)***

Oriental Bank of Malaya v. Rubber Industry (Replanting) Board [1957] 23 MLJ 153 ***(refd)***

Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali Bin Ibrahim [1985] 2 MLJ 225 ***(cit)***

Legislation referred to:

Bills of Exchange Act 1949, s. 85(1)
Bills of Exchange Ordinance 1949, 82
Rules of the High Court 1980, O. 14
Subordinate Court Rules 1980, O. 26A

For the appellants - B. K. Lim; M/s. Skrine & Co.
For the respondent - Deborah Jaswinder Kaur; M/s. Shook Lin & Bok

JUDGMENT

Wan Adnan bin Ismail J:

This is an appeal against the decision of the learned Sessions Court Judge, Kuala Lumpur dismissing the appellants'/plaintiffs' application for summary judgment under O. 26A of the Subordinate Court Rules 1980.

The 1st and 2nd plaintiffs are the drawer and payee respectively of a cheque No. 386874 dated 2 January 1986 drawn on Bank Bumiputra Malaysia Bhd., Alor Setar. The cheque was crossed and marked with the words "Not Negotiable, Account Payee Only" and made out for the sum of RM34,200. The respondents/defendants are bankers.

On a date unknown between 2 January 1986 and 20 January 1986 the cheque was stolen by persons unknown. It was presented to the defendants for collection on 20 January 1986 and the defendants collected the proceeds of the said cheque and paid it to the persons unknown.

The application was supported by two affidavits of Teh Li Choo, the secretary of the 2nd plaintiff affirmed on 30 March 1989 and 26 July 1989. The defendants did not file any affidavit in reply.

In his affidavit affirmed on 30 March 1989, Teh Li Choo stated that the 2nd plaintiff had never opened or maintained any account with the defendants. In their reply to the 2nd plaintiff the defendants confirmed in their letter dated 27 March 1986 that the account of "Muda Fibre Manufacturing Sdn. Bhd. - A/C No. 0039" was opened at their bank on the 20 January 1986. They also said in their letter that the said cheque was received by them in the ordinary course of business and was collected through normal banking procedure.

On 16 April 1986 M/s. Skrine & Co. the solicitors for the 2nd plaintiff wrote to the defendants requesting the following information:

(a) On what date was an application first made to you for the opening of an account with you in the name of "Muda Fibre Manufacturing Sdn. Bhd.;
(b) The name of the person or persons who called at your bank in connection with the opening of the account;
(c) What steps you took to establish the identity and integrity of the directors of such company and whether you obtained and followed up on references relating to such directors;
(d) Was there produced to you the Certificate of Incorporation, Memorandum & Articles of Association of the applicant company and also a certified true copy of the resolution of the directors of such company appointing your bank as bankers of such company.
(e) Whether you made a search against the applicant company in the Companies Registry.

The defendants did not give the information requested.

The learned Sessions Court Judge held that there was a triable issue, namely, whether or not there was negligence on the part of the defendants.

In *National Company For Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 MLJ 300 the Federal Court held that once the plaintiff had satisfied the essentials of an O. 14 application the plaintiff would have established a *prima facie* case and would become entitled to judgment. The Court then said - "The burden then shifts to the defendant to satisfy the Court why Judgment should not be given against him."

In *Perbadanan Pembangunan Ekonomi Sarawak v. Sarawak Motor Industries Bhd.* [1989] 3 MLJ 246 the defendant filed an affidavit opposing the plaintiff's application for judgment under O. 14 High Court Rules. The Court found that the affidavit did not condescend into particulars as to how or why the interest claimed was without basis and that it contained no more than a mere denial. The Court reaffirmed the established principles that in an application under O. 14 the affidavit showing cause must condescend upon particulars.

In A*ssociated Tractors Sdn. Bhd. v. PMB (Kulim) Sdn. Bhd. & Ors.* [1989] 1 MLJ 245 the Court held that it was not enough for the defendants to merely refer to the statement of defence without condescending to particulars.

In an application under O. 14 (or O. 26A of the Subordinate Court Rules) the issue is whether or not there is a triable defence. This means that it is for the defendant to show on merits he has a good defence to the claim or that a difficult point of law is invoked or the dispute is as to the fact which is to be tried or any other

circumstances showing reasonable grounds of a *bona fide* defence (see *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali Bin Ibrahim* [1985] 2 MLJ 225).

Section 85(1) of the Bills of Exchange Act 1949 provides af follows:

> 85.(1) Where a banker, in good faith and without negligence -
>
> (a) receives payment for a customer of an instrument to which this section applies; or
> (b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself;
>
> and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.

This provision is for the protection of bankers. But in order to have that protection they must prove that they had acted in good faith and that there was no negligence on their part. The burden of proof is on the bankers.

In this case it is for the defendants to prove that they had not been negligent. This they did not even try to do. They did not file any affidavit in opposition to the application. They did not contradict the material allegations in the affidavits filed in support of the application. They are therefore deemed to have admitted them (see *Overseas Investment Private Limited v. Anthony William 0'Brien & Anor.* [1988] 2 CLJ 238). They did not supply the information requested by the solicitors for the 2nd plaintiff in the letter dated 16 April 1986.

The plaintiffs have clearly established a *prima facie* case against the defendants.

The defendants had filed a statement of defence where they stated that they did at all times exercise the highest degree of prudence, skill and care in the business of bankers in the transaction. In other words they denied any negligence on their part. In my opinion this is not sufficient to raise a *bona fide* triable defence. It is only a bare denial. They had to condescend to particulars by way of an affidavit. They did not even disclose (though requested to by the solicitors for the 2nd plaintiff) how they handled the application for the opening of the account in the 2nd plaintiff's name with the bank.

The learned Counsel for the defendants referred me to the case of *Oriental Bank of Malaya v. Rubber Industry (Replanting) Board* [1957] 23 MLJ 153 where the bank claimed protection under s. 82 (now s. 85) of the Bills of Exchange Ordinance 1949. He pointed to me that the issue of negligence was decided after a full trial. In my opinion it does not follow that in all cases when s. 85 of Bills of Exchange Act is raised there ought to be a full trial. In a proper case the plaintiff may obtain judgment under O. 14 of the Rules of the High Court or O. 26A of the Subordinate Court Rules.

In this case I find that defendants had failed to raise a *bona fide* triable issue. I therefore allowed the appeal with cost and ordered that judgment be entered for the plaintiffs as prayed with costs.